No. 3953.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKELL, as Receiver of the Scandinavian American Building Company, a corporation, *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a corporation, E. E. DAVIS & COMPANY, a corporation, et al., *Appellees.*

BEN OLSON COMPANY, a corporation, *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a corporation, E. E. DAVIS & COMPANY, a corporation, et al., *Appellees.*

J. P. DUKE, as Supervisor of Banks of the State of Washington, etc., *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a corporation, E. E. DAVIS & COMPANY, a corporation, et al., *Appellees.*

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

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Answering Brief of E. E. Davis & Company, Appellees, to the Above Appeals.

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STATEMENT.

E. E. Davis & Company, while not desiring to unnecessarily multiply the labors of this court with a multitude of briefs, and while relying in large measure upon the briefs of others filed herein to

answer the question raised against its lien, where others are similarly situated and have filed comprehensive briefs herein, yet this appellee deems it necessary to present separately some features which affect the defense of its lien claim as allowed by the trial court differently from the claims of others involved in these appeals.

It may not be amiss to say that E. E. Davis & Company is entirely distinct from R. T. Davis, and others, who constitute the Tacoma Millworks Supply Company. E. E. Davis & Company had the contract for the steel erection of this proposed bank building, and was allowed by the trial court for this work a contractor's mechanic's lien against this building and the lots upon which it is situated in the sum of $30,349.61, together with interest amounting to $2,341.52 and for an attorney's fee of $3500.00 and for costs and disbursements taxed in the sum of $5.00 (Record 511-512).

A contractor's lien being the lowest ranking of mechanic's liens, E. E. Davis & Company is interested in the reduction or defeat of all other mechanic's liens allowed herein, as well as of the two mortgages claimed by the Bank and by the Receiver. (Record p. 520 XXXIII.)

While the trial court found that this appellee, as well as several others had signed contracts containing a clause waiving the right to a mechanic's lien, yet the court also found that this waiver was fraudulently obtained, and was therefore not binding upon this appellee and certain others, to-wit (Finding No. 33, Record p. 520):

> "That the waivers of lien made by the following defendants, to-wit * * * E. E. Davis & Company * * * were induced by and made in reliance upon certain false material representations made by or on behalf of the defendant Scandinavian American Building Company, which representations amounted to and constituted constructive fraud, and that by reason thereof said waivers are decreed to be of no force and effect, and that in addition thereto, the defendant E. E. Davis & Company, upon discovery of the falsity of said representations and upon the breach by the defendant Scandinavian American Building Company of its contract, promptly rescinded its contract with said defendant Scandinavian American Building Company."

We assert that these findings were amply justified by the evidence, and there is no showing to the contrary by any of the parties appellant attacking our lien upon this ground.

E. E. Davis & Company, as soon as it had learned of the falsity of these assertions, relying upon which it had signed the lien waiver clause of

the contract, notified the Building Company in writing of its rescission of the contract (Record p. 392). That it pleaded these facts of this rescission and asked for the reasonable value of its work and labor and not the contract price (Record p. 374), and maintained this position in its pleadings and in its proofs and in the award under the decree throughout, to which there was no objection on the part of any one; also lien notice (Record pp. 394 to 398).

ANSWERING THE BRIEF OF FORBES P. HASKELL, JR., AS RECEIVER

Haskell, as Receiver, in his opening brief (pp. 52 to 65, incl.), insists that the various claimants who in their contracts had waived their lien right, were bound by this waiver, in spite of the fact that this might have been obtained through fraud of the Building Company, because, as the Receiver claims, these claimants did not *rescind* the contract, but attempted to recover *under the terms of the contract.*

While we agree with this principle, it cannot be urged against E. E. Davis & Company, because, as set

forth in our statement above, this claimant *did rescind* the contract and attempted to, and did, recover on a *quantum meruit* and not under the contract. The rule, however, is, we believe, applicable to the Ben Olson Company claim, and to the Tacoma Millworks Supply Company claim, for these parties did not rescind, but sought to recover under the contract. This appellant, the Receiver admits, made a sufficient showing of fraud to estop the claim on the Building Company's part of waiver, but for this action on the part of some of the claimants in still adhering to the contract they are not in this position (p. 58, Receiver's brief). "Assuming, then, that there has been a false misrepresentation established upon which the lien claimants who waived their claims acted upon discovery of that fraud, such claimants might pursue one of two remedies * * *;" and so E. E. Davis & Company did, rescinding and suing upon a *quantum meruit.*

The Receiver, at page 55, cites a number of cases to the effect that a waiver of lien is not disregarded, and the lien right restored, by the Owner's failure to pay according to the terms of the contract.

While this may or may not be the law, it is not material in this case, or with E. E. Davis & Company, for its rescission was not on account of the

failure of the Building Company to pay *alone,* but also because of the discovery of fraud which induced it to sign the contract with this waiver. In the first place, these authorities are not in point, even upon the theory upon which they are advanced, for they are applicable only to the case of a divisible contract, the clauses of which are independent and not dependent. The present contracts, however, were made by their very terms entire, indivisible and dependent.

Moreover, when E. E. Davis & Company rescinded its contract for fraud, it was as if no contract had ever existed. The contract was void in toto—rescinded in toto, and we sought to recover—and did recover, on the equitable principle that one having parted with money or property, or benefited another under a contract, rescinding for the fraud of the other, can recover for the value of the benefit derived by the other under the contract.

ANSWERING THE BRIEF OF THE APPELLANT BEN OLSON COMPANY.

This appellant, Ben Olson Company, claimed a contract with the Scandinavian American Building Company for supplying certain hardware and heating and plumbing articles and fixtures, for which it claimed a mechanic's lien.

The trial court gave it a general judgment against the Building Company for some $13,000.00, but denied it any mechanic's lien. In this appeal it is seeking to enlarge this judgment and to obtain a lien as a contractor, and announces in its opening brief on appeal: "This appellant complains of none of the other awards except that to the Scandinavian American Bank which was a general judgment against the Scandinavian American Building Company for $232,136.62 and interest in the sum of $19,136.62, with a rank the same as that of the appellant * * * ." (Olson Company brief, p. 2.)

At page 43 of this brief it also says: "But no other claimants are interested in the matter because they are all either laborers or materialmen, and therefore superior in rank * * *."

But E. E. Davis & Company, which was allowed a contractor's lien of $30,000 and over *is* interested

in this matter, as its recovery under the security will be proportionately lessened by every other claim which is admitted to the same or superior rank.

The Ben Olson Company's brief, pp. 1 to 47, deals with this attempt to obtain on review the above relief, to which matter E. E. Davis & Company is opposed.

The brief from pp. 47 to 77 is directed to the error of the trial court in refusing to hold that the Scandinavian American Bank and the Scandinavian American Building Company were identical corporations and that the bank was liable for the obligations created in the name of the Building Company, and also to the error of the trial court in giving a general judgment in favor of John P. Duke, Supervisor of Banks of the State of Washington, against the Scandinavian American Building Company for $232,094.42 and interest. With both of these latter positions, however, this appellant, E. E. Davis & Company, is in accord with Ben Olson Company, as it may be materially affected by this question if the proceeds of the sale of the building are not sufficient to pay all liens.

REFERRING TO THE BEN OLSON CLAIM THAT IT IS ENTITLED TO A LARGER JUDGMENT AND TO A MECHANIC'S LIEN.

By referring to the decree (Record p. 514 to p. 516) it will be seen that the trial court found that the Ben Olson Company was entitled to a judgment of $13,407.43 and interest against the Building Company as damages because of breach of contract on the part of the Building Company. The court also found that the Ben Olson Company under its contract with the Building Company had furnished materials to be installed and used in the construction of the building and had furnished labor in connection with the installation thereof of the value of $9437.75, and that it had filed a lien therefor,

> "but that by reason of the inclusion in said claim of lien of the grossly excessive amounts, and by reason of said defendant's failure to pay the defendant Crane & Company, whereby Crane & Company were required to and did file a claim of lien, establishing the same in this suit, and because the value of the labor performed and material actually furnished to said defendant Scandinavian American Building Company is less than proper offsets and credits thereto, and for want of equity in said claim, it is decreed that defendant Ben Olson Company have no lien whatsoever upon the real property hereinabove described."

For these overlapping items Crane & Company was allowed in the decree a materialman's lien for over $16,000 and interest, and $2,000 attorney's fee (decree, Record p. 503).

While the findings of the lower court in this equity case are not controlling on review, at the same time they will be followed, we take it, unless manifestly erroneous.

Valve Co. vs. Moorehead, 226 Fed. 202;
United States vs. Oil Co., 286 Fed. 481;
Estep vs. Coal Co., 239 Fed. 617;
Semidey vs. Central Coal Co., 239 Fed. 610.

A diligent search of the proofs found at pp. 868 to 934 of the Record are far from showing any such error.

On the contrary, they do show that the greater part of the material for which claim was made was never delivered at the building or on the building premises; some of it never left the workshop of the claimant; much of it was still with Crane & Company, sub-contractors; some delivered to the building premises and afterwards, with the permission of the court, was withdrawn by the claimant. The proofs presented such a maze of items indistinguishable as to delivery, non-delivery, withdrawal and admixture with the Crane & Company articles, as

to make it impossible to determine whether they were lienable or not.

We find nothing in these proofs to present an excuse for or an explanation of the inequity of the duplications, overclaims and excessive charges, for which in part the court below found the claim as entirely unconscionable.

The explanation offered in Ben Olson & Company's brief at page 43 that no other claimants are interested in the matter, and only the Building Company, and that that company was not in a position to make objection, cannot apply to this lien claimant, E. E. Davis & Company, for the reasons above set out.

As to the effect of the nondelivery of the goods at the building or on the building premises, the same rule applies to this claim as to that of the Tacoma Millworks Supply Company, as to which we respectfully refer to the answering brief of McClintic-Marshall Company, appellee, filed in answer to the opening brief of the Tacoma Millworks Supply Company.

But the Ben Olson Company was bound by the waiver of its lien right contained in its contract. This contract of Ben Olson & Company con-

tained the Article XIV. which was in many of the other contracts (Ben Olson & Company brief, p. 15), waiving the right of lien; as an estoppel against which the Ben Olson Company had pleaded and proven fraudulent representations made by the Building Company which materially induced this contractor to sign the contract containing such a waiver clause, the same as was presented in the cases of this appellee, E. E. Davis & Company, the Tacoma Millworks Supply Company, and others.

But the Ben Olson Company is not in a position to urge such an estoppel because it did not rescind the contract, but sought to recover, and was allowed to recover under the contract only.

For the points of law and authorities on this question, we direct the court's attention to the opening briefs filed in this case by *McClintic-Marshall Company, E. E. Davis & Company* and *Far West Clay Company,* appellants, vs. *Tacoma Millworks Supply Company* (copies of which brief are served with this upon Ben Olson & Company).

The facts of the Ben Olson & Company claim as affected by this question are as follows:

From the allegations of the Ben Olson Company cross-bill, Articles XVI to XXIII, Record 229

to 302, it is difficult to say whether the pleader is attempting to recover at the reasonable price of the articles and labor, or at the agreed contract price. The same is equally true of its statements in its lien claim at page 320.

Record, pp. 910 to 912, show proofs made on the theory of the contract price and not reasonable value.

At page 914 of the record in answer to a question of the court, counsel for the Ben Olson Company says:

> "MR. STILES—I am not going to ask anything for it, but I am going to ask something at the end of this matter, for our reasonable profit on the contract, and to do that, I have to state what would have been required."
>
> "MR. OAKLEY—I want to make objection on the ground that it is an attempt to take a lien on an item that represents damages for the breach of this contract, which is not recoverable in this action."
>
> "THE COURT—I have some doubt about it, but I do not want to prejudge it. Objection overruled for the present * * *."

At page 915, Mr. Stiles says:

> "The amounts claimed under the lien and the amounts which it would take to complete the job, including labor and material, total $81,970.23, which would have been the cost of the job completed to Olson & Company. The contract was for $90,000.00, and we would have realized

> $8,029.77, which would have been our profit on the job." Also shown on schedule, p. 920.

The trial court evidently did not apprehend that the Ben Olson Company had rescinded its contract, for the judgment which it allowed it was as damages for breach of the contract (decree, Record p. 515), treating the contract as still existing.

As pointed out by the briefs on this question in the cross-appeals of McClintic-Marshall Company and others, hereinabove referred to, one seeking to rescind must do so promptly and decisively, and with definite notice to the other parties. Ben Olson & Company certainly has not complied with these requirements.

The Supreme Court of this state has expressly held that no mechanic's lien can be had for lost profits.

Gray vs. Hicky, 97 Wash. 278.

In this case at page 280 it expressly refers to the *Gould vs. McCormick* case cited and relied upon by the appellant.

The other cases referred to by appellant's counsel (brief, p. 39), *Noyes vs. Pugin* and *Chase vs. Smith,* were both law actions tried before a jury and not equity suits for lien.

We suggest this further reason why the remedy, or measure of recovery, urged by this appellant is not applicable to this case, namely: where a contract is rescinded for breach on the part of the owner by failure to make final payment, the contract may be considered as still existent for the purposes of fixing the measure of recovery at the suit of the party not in default, but where the contract is rescinded for fraud, as was claimed in this case by the appellant, the contract is no longer existent for any purpose. If avoided, it is avoided in toto, and the plaintiff's recovery is only for the value of the benefit that he has rendered the other party, namely, on a *quantum meruit*.

ANSWERING THE BRIEF OF J. P. DUKE AS SUPERVISOR OF BANKS.

Counsel of other lien claimants in this case have presented the law, from the standpoint of the lien claimants, as to the question of priorities between the mortgages claimed by this appellant and the mechanic's lien claimants.

We undertake here only to state the facts relating to the time of the attachment of the lien of E. E.

Davis & Company and these mortgages, if good for any purpose. E. E. Davis & Company commenced work under its contract of steel erection on the 14th day of June, 1920, and continued in the performance of the same thereafter until the 15th day of January, 1921, while the assignment of the mortgage did not occur until October 7, 1920, and no advancements were made on said mortgage until a much later date (brief of J. P. Duke, p. 16).

For the foregoing reasons we therefore respectfully submit on behalf of E. E. Davis & Company, appellee:

That the decree of the trial court should be sustained as against the respective claims of these appellants, which, while they do not attack the validity or amount of the claim of E. E. Davis & Company, yet seek to subordinate it in rank to their demands to the practical elimination of all value in its security.

Respectfully submitted,

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PETERS & POWELL,
Of Counsel.